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CASE NO. 89-36

In the United States Supreme Court

October Term 1989

Leo M. Mullen , M.D. Pro Se,

Petitioner

versus

Land Parcel Liquidators et al.,

Tamara Steinsapir, Marion Marshal,

Donald A. Rosen, DBA, T.D. Foreclosure Co.,

Respondents,

Brief in Opposition To

Petition for Writ of Certiorari

On Appeal From The United States

Court of Appeals for the Ninth Circuit

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Marion Marshal and

Hillwood Assurance Corporation

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STATEMENT OF THE CASE

HILLWOOD ASSURANCE CORPORATION and Respondent MARION MARSHALL, for themselves alone (hereinafter for the sake of convenience collectively referred to as "RESPONDENTS"), oppose the Petition for Writ of Certiorari of LEO M. MULLEN, M.D. ("MULLEN"), based on the denial of MULLEN's motion to set aside judgment based on the fact that the Order on which MULLEN, seeks review is supported by Federal Rule 41(b) and 60(b) and applicable case law, and this Court should therefore affirm the ruling of the United States District Court (trial court) and Ninth Circuit Court of Appeals in this case.

In addition, the Petitioner has both failed to comply with the United States Supreme Court Rules of Procedure and has failed to allege any grounds whatsoever which allows this Court to assume jurisdiction over this case.

STATEMENT OF FACTS

Respondents will not embark at this late date in an involved and detailed journey through the convoluted and farcical pleadings and papers filed by Petitioner MULLEN herein, and will therefore be brief in recitation of the pertinent facts.

Suffice it to say that MULLEN is an individual whom, by his own admission, the State of Missouri has labeled "insane" and who has insisted on filing or has attempted to file numerous rambling motions and other documents, and in one case served Respondents with a poem in an apparent attempt to force settlement in this matter, albeit an unusual manner.

MULLEN bought land, at auction, from Respondents TAMARA STEINSAPIR and LAND PARCEL LIQUIDATORS. He, thereafter, failed to make payments on the property which was

foreclosed by Respondent T. D. FORECLOSURE SERVICE, and the property was resold. Petitioner MULLEN then sued all Respondents alleging "shills" were used, and "fraud" was committed, although MULLEN has never demonstrated one scintilla of evidence for any of his allegations.

From the inception of this case, MULLEN has refused and failed to cooperate with Respondents in responding to any discovery which has been served upon him, and in fact has been openly contemptuous of the Judges of the Central Federal District of California and the legal process in general. At a Mandatory Status Conference on August 25, 1986, all Respondents appeared through their counsel as required by the Court. MULLEN did not appear, citing various misunderstandings, misinterpretations, and other misapprehensions having very little to do with the facts in this matter.

On August 25, 1986, the Honorable Judge Ideman in the United States Distract Court for the Central District of California entered an order dismissing this action due to the non-cooperation by MULLEN and failure to appear as ordered by that Court on June 19, 1986. MULLEN soon thereafter filed papers to have the order set aside, which were returned to him due to his failure to comply with federal pleading requirements. Almost one year thereafter, MULLEN brought a "Motion to Set Aside Judgment" on August 20, 1987. In it, MULLEN tried to set aside the Order entered by the Honorable Judge Ideman on August 25, 1986.

This Motion was denied on December 22, 1987, by the Honorable Judge Rafeedie. Petitioner then appealed to United States Court of Appeal for the Ninth Circuit in April of 1988. On October 31, 1988, the Ninth Circuit denied the appeal and found

Petitioner's appeal to be "frivolous" and awarded appellees attorney fees. It is from this denial of his appeal to the Ninth Circuit that Petitioner now seeks review of his case by Writ of Certiorari to the United States Supreme Court.

OBJECTION TO THE PETITION FOR WRIT OF CERTIORARI BASED ON THE MERITS

I.

ABSENT AN ABUSE OF DISCRETION, THE REFUSAL OF A COURT TO SET ASIDE AN ORDER OR JUDGMENT WILL BE SUSTAINED AGAINST AN APPEAL

The law is clear that absent an abuse of discretion, the trial court will be sustained in its denial of a motion to set aside judgment or order. (Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963), citing Sweeney v. Anderson, 129 F.2d 756 (10th Cir. 1942) Schotkin v. Westinghouse Electric Manufacturing Corp., 169 F.2d 825

(10th Cir. 1948)).

In the instant case, MULLEN has engaged in a consistent and continuing pattern of noncooperation, abuse, and obstruction of justice in his attempts to extort a settlement from Respondents herein.

In addition, MULLEN does not dispute that he had ample notice of the hearing at which his Complaint was dismissed. Nor, amazingly, does he contend that anyone but himself was to blame for his nonappearance at this hearing. MULLEN states, and has stated throughout these proceedings, merely that he "overlooked" the date of said hearing, and should therefore be allowed a continuance. Before the actual date of the hearing, MULLEN was haranguing the trial court and filing incomprehensible papers in his attempts to acquire such a continuance. Clearly Judge Ideman was under no

obligation to award such a continuance; FRCP 60(b) provides that an order setting a scheduled hearing "shall not be modified except by leave of judge. . . when authorized by district court rule upon a showing of good cause." Judge Ideman had clear discretion to determine whether MULLEN's negligence constituted "good cause" under this rule.

Even assuming that MULLEN initially had valid grounds for bringing an application to set aside the order under FRCP 60(b), clearly his neglect in doing so until just before the outer limit of this rule provides ample ground for the denial of such motion by Judge Rafeedie. Such delay reinforces Respondents' contentions that MULLEN has, throughout this litigation, been dilatory in prosecuting same.

The law is clear that Rule 60(b) is not to be invoked to give relief to a

party whose error is traceable to a lack of care. (7 Moore, Federal Practice, 60.22(2), at 60-181; Sadowski vs. Bombardier Ltd., 539 F.2d 615 (7th Cir. 1976)). MULLEN has exhibited a palpable, continuous, and unremitting lack of care in his prosecution of this action, beginning with his obstruction of Respondents attempts to conduct discovery in this matter, continuing with his failure to make his motion to set aside the order of Judge Ideman until almost one year after the issuance of same, and ending with his attempts to file a brief in the Ninth Circuit Court of Appeals, which did not even marginally comply with the appellate court's requirements.

In addition, although this case had only been pending for five months, MULLEN had more than amply demonstrated his unwillingness to provide Respondents with any meaningful discovery whatsoever.

Clearly, based upon such evidence, Judge Rafeedie was within the bounds of his discretion in denying MULLEN'S motion to set aside the dismissal of Judge Ideman.

II.

THE UNDERLYING ORDER OF JUDGE IDEMAN WAS PROPER, JUDGE RAFEEDIE'S DECISION WAS PROPER UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)AND IS NOT AN ABUSE OF DISCRETION

Judge Rafeedie, in his Order Denying Motion To Set Aside Judgment, conducted a thorough analysis of Federal Rule of Civil Procedure 60(b) as it applies to the facts at bar. His well reasoned and complete decision demonstrates a clear understanding of both the law and the facts as they relate to this matter. Since the Court must affirm Judge Rafeedie's decision absent an abuse of discretion (Meeker, supra), Respondents will briefly examine the basis for his

affirmation of the underlying decision of Judge Ideman.

A leading case on the subject of dismissal of a complaint for Plaintiff's failure to appear at hearings and cited by Petitioner is Link vs. Wabash Railroad Company, 370 U.S. 626, (1962), reh. den., 371 U.S. 873. It is instructive in its similarity to the case at bar. In this case, The United States Supreme Court affirmed a dismissal of plaintiff's claim where the only alleged failure of plaintiff to prosecute an action was the failure of plaintiff's counsel to appear at a pretrial hearing. (Link, supra, at 629.) The majority, through Justice Harlen, stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot

seriously be doubted (citations omitted). The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the district courts. The power is of ancient origin, having its roots in the judgments of nonsuit and nonprosequitor entered at common law. . . and dismissals for want of prosecution of bills in equity, . . . [i]t has been expressly recognized in Federal Rule of Civil Procedure 41(b). . .". Later, the court stated the rule

to be applied in such cases as follows:

> "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." (Link, supra, at 632).

Link specifically stated that if a plaintiff felt that his case was wrongfully dismissed, FRCP 60(b) was available to him.

It was these facts and this law that supports the ruling of Judge Rafeedie herein. Judge Rafeedie, in reviewing this case, correctly applied this rule, and since there is clearly no abuse of discretion, his decision should not be set aside.

III.

THE FACT THAT THIS CASE HAD BEEN PENDING FOR FIVE MONTHS DOES NOT EXCUSE MULLEN'S ABSOLUTE AND TOTAL REFUSAL TO COMPLY WITH THE ORDERS OF THE COURT, AND SUPPLY ADEQUATE DISCOVERY TO DEFENDANTS; SUCH CONDUCT INDICATES A PATTERN OF NON COOPERATION AND FAILURE OF PROSECUTION LENDING ADDITIONAL SUPPORT TO DISMISSAL OF PETITIONER'S COMPLAINT

The failure of MULLEN to appear at the mandatory status conference hearing in this case was only one in a series of obstructive behavior in which MULLEN had engaged. MULLEN has refused to answer Interrogatories, refused to answer Requests for Admissions, attempted to add Respondents' counsel to the lawsuit due to their actions in defense of their clients, accused two separate trial judges of bribery, and taken other actions that demonstrate beyond any reasonable doubt

MULLEN'S contempt for the Federal Judicial System in general, and the rights of Respondents in particular.

MULLEN, although only before the Central District of California for five months in this matter, had previously prosecuted this case in a federal district in Missouri. After this case was dismissed there, MULLEN refiled same in California. Therefore, MULLEN has had an ample opportunity to prosecute his case and has shown only an unwillingness to abide by applicable rules and Federal Statutes.

Cases holding that a dismissal by a district court of MULLEN'S action for failure to attend a pre-trial conference uniformly state that in those cases there was no evidence of deliberate delay. (See for example, Dove v. Cadesco, 24 F.R. Serv. 2d 967, 569 F.2d 807 (C.A. 4th 1978); Fischer v. Buehl, 15 F.R. Serv. 2d 759, 450 F.2d 950 (C.A. 3rd 1971)).

It has been held that a context of facts reflecting a "lack of prosecutive intent" will support the denial of a motion for relief from dismissal under Rule 60(b), see Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973). In that case, as in this one, there was a conflict of facts aside from the failure to appear at a pretrial conference, which supported dismissal by the trial Court. The court in Beshear, citing with approval Delno vs. Market St. Realty Company, 124 F.2d 965, 967 (9th Cir. 1942), held:

> "Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said

that the trial court
abused its discretion."
(Beshear, at 134).

IV.

PETITIONER FAILED TO DEMONSTRATE IN HIS MOTION BEFORE JUDGE RAFEEDIE ANY MERITORIOUS CLAIM, AND ON THAT BASIS ALONE, THE ORDER OF JUDGE RAFEEDIE SHOULD BE AFFIRMED

The law is clear that any motion under FRCP 60(b) for relief must be buttressed by a showing of existence of a meritorious claim. This requirement was set forth extensively in Gomes vs. Williams, 420 F.2d 1364 (10th Cir. 1970), and cited with approval in Beshear, supra, at 132. In Gomes, although there was excusable neglect (a fact which is not present in the case at bar), where movant did not demonstrate a meritorious claim, his motion for relief from dismissal under

FRCP 60(b) was properly denied.

In this case, this Court can verify for itself that nowhere in any of Petitioner's papers has Petitioner demonstrated a legally cognizable claim against Respondents herein.

V.

THE FEDERAL COURT OF APPEALS, NINTH CIRCUIT CORRECTLY UPHELD THE LOWER COURT'S RULING

In affirming its decision below, the Ninth Circuit court of appeals found that MULLEN did not make his 60(b) motion within a reasonable time, and that MULLEN's failure to appear at the mandatory settlement conference was the result of his own culpable conduct. The court of appeal found no evidence of prejudice or bias against MULLEN stemming from an extrajudicial source. Finally, in awarding appellees (Respondents herein) attorneys fees, the Ninth Circuit stated: "Mullen's

appeal is frivolous because his motion is based on completely unsubstantiated claims of excusable neglect made almost one full year after he attempted to file a procedurally defective motion based upon the same claims." The Court of Appeals decision should not be disturbed.

OBJECTION TO PETITION OF WRIT OF CERTIORARI BASED ON LACK OF JURISDICTION AND PETITIONER'S FAILURE TO COMPLY WITH U.S. SUPREME COURT RULES

I.

PETITIONER HAS FAILED TO COMPLY WITH RULE 21 PROCEDURES REGARDING PETITION FOR WRIT OF CERTIORARI

United States Supreme Court Rule 21 provides that the Petition for Writ of Certiorari shall contain various items as outlined in (a)-(j). These items are not contained in MULLEN's Petition for Writ of

Certiorari.

Rule 21(1)(a) provides that the Petition shall contain questions presented for review. Review of the Brief of Petitioner reveals no questions presented for review but only four statements under a heading entitled "questions presented for review". These four statements by Petitioner contain various reasons why Petitioner believes that he has been treated unjustly by the courts below but does not present any questions for review.

Rule 21 (1) (b) provides that the Petitioner shall list in the petition for writ of certiorari all parties to the proceeding. The caption in the Petition does not contain one of these defendants/appellees, that is Hillwood Assurance Corporation. In addition, on page 4 of the Petitioner's Brief there is a certificate of service of additional parties, which does not indicate Hillwood

Assurance Corporation as a Respondent. Therefore, Hillwood Assurance Corporation is not sure whether Petitioner is appealing to the United States Supreme Court as to it since, Hillwood Assurance obtained judgment in its favor and an award of costs in the courts below against Petitioner. Hillwood has, however, filed this objection in conjunction with respondent Marion Marshall.

Rule 21 (1) (e) requires that the petition set forth a concise statement on the grounds on which the jurisdiction of the court is invoked. This includes the date of the judgment of decree, which is to be reviewed in the time of this entry. Petitioner's Brief does not contain such dates or description of any judgment of which it seeks review, nor does it contain a jurisdictional statement. Specifically, sub(e)(4) requires that the petitioner set forth the statutory provision believed to

confer jurisdiction to review the judgment decree in question by writ of certiorari. Petitioner's Brief does not contain any such reference.

Similarly, Sub(f) requires that the petitioner sets forth constitutional provisions, treaties, statutes, ordinances, or regulations that the case involves with a verbatim citation to the appropriate authorities. Again, Petitioner's Brief does not contain any such references, nor any verbatim citations thereto.

Subparagraph of Rule 21(g) requires a concise statement of the case containing the facts material to the consideration of the question presented. There is no statement of the case contained in the Brief but instead, on pages 5 and 6, Petitioner makes a personal statement about his "feelings" as to his treatment in regard to the case below and his subsequent treatment by the appellate court.

Rule 21(i) requires the statement of the case shall also show the basis for federal jurisdiction in the court for first instance if the appeal is from the judgment of the federal court. The Brief does not contain any such jurisdictional reference.

Finally, 21(j) requires a direct and concise argument amplifying the reasons relied on for the allowance of the writ, which references Rule 17. As discussed more fully below, petitioner has set forth no reason to allow this Court to consider review of the federal court ruling by Writ of Certiorari.

II.

PETITIONER HAS FAILED TO COMPLY WITH RULE 17 BY FAILING TO PROVIDE ANY GROUNDS FOR THIS COURT TO REVIEW THE FEDERAL COURT OF APPEAL DECISION BY WRIT OF CERTIORARI.

As set forth in Rule 17, (1) the

United States Supreme Court has set forth grounds upon which it will consider granting review of a federal court of appeal's decision. In order to obtain review by the United State Supreme Court, the federal Court must have rendered a decision in conflict with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort or as so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Petitioners's Brief sets forth absolutely no grounds upon which this court should assume jurisdiction based on the foregoing premises set forth in Rule 17.

Subparagraph (1)(c) of Rule 17, also permits the Supreme Court to assume

review of a federal court of appeals decision if an important question of federal law has been decided and which has not been but should be settled by the United States Supreme Court, or has decided a federal question of weighing conflict with an applicable decision of the United States Supreme Court. Again, Petitioner has failed to set forth, any such grounds for consideration of his case by this Court, as required by this subsection.

Respondents cannot intelligently respond to the Brief of Petitioner as it is unintelligible, rambling and utterly fails to conform with the United States Supreme Court procedural rules and contains no statement of jurisdiction to which Respondents can address any objection. As set forth above, the Petitioner's Brief so completely fails to conform with the requirements of Rules 17 and 21, that Respondents cannot properly respond to any

jurisdictional basis for this Petition, Respondents cannot even determine which parties are actually part of this Petition for Writ of Certiorari. Without these essential items in the Brief, it is futile to conjecture and attempt to address any of the statements outlined in Petitioners' Brief.

CONCLUSION

Petitioner's Brief is simply a rambling recapitulation of his belief that he has been the subject of injustice and he is using this petition as a forum to voice his personal feelings.

MULLEN has consistently attempted to subvert the ends of justice, has failed to cooperate in any manner with the discovery of Respondents, has set forth no cognizable claim against Respondents in his papers, and has failed to appear at a court-ordered hearing of which he had

admittedly ample notice. These are just the highlights of a course of conduct and a context of facts that underlay the decision and order of Judge Rafeedie. The Ninth Circuit Court of Appeals concurred. Clearly, there are no grounds whatsoever to grant Petitioner's Writ of Certiorari, and for the reasons stated above, the petition for Writ of Certiorari should be denied as lacking jurisdiction.

DATED: 8/16/89

Respectfully submitted,
LAWRENCE ALLEN,
A Professional Law
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By Klint James McKay
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MARSHALL

CERTIFICATE OF SERVICE

The undersigned represents and certifies that I am over the age of 18 years, that I am employed by the law offices of ALLEN & ALLEN, A Professional Law Corporation, 5950 Canoga Avenue, Suite 440, Woodland Hills, California 91367, and that on August 17, 1988, I caused to be deposited in the United States Mails, postage prepaid, a copy of Respondent's Brief in objection to Petition for Writ of Certiorari, addressed to the following parties:

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I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on this 17 day of August, 1988, at Los Angeles, California.

CARMEN O'NEIL